Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: A 289/2017

Before: The Hon. Mr Justice Waglay
The Hon. Mr Justice Binns-Ward
The Hon. Mr Justice Nuku

Hearing: 2 February 2018
Judgment: 7 February2018

In the matter between:

COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE Appellant

and

JANICE BEVERLEY SHORT First Respondent
JOHANNES HERMANUS JACOBS Second Respondent

JUDGMENT

BINNS-WARD J (WAGLAY and NUKU JJ concurring):

[1] The Commissioner for the South African Revenue Service has come on appeal from the judgment of the Tax Court (Cape Town) upholding the appeal by the respondents to that court against the assessment by SARS of transfer duty on the value of the property acquired by them in terms of an agreement they concluded, as purchasers, with Morrow Investments

252 CC, as seller, in respect of an apartment in a sectional title development in Green Point, Cape Town. The agreement was subject to the formalities prescribed in terms of the Alienation of Land Act 68 of 1981, and its terms were entrenched in a deed of alienation, dated 7 August 2009, accordingly. It stipulated that the agreed purchase price was R4,2 million, payable to the seller's conveyancers by way of a deposit of R250 000 within five days of the acceptance of the offer to purchase, with the balance to be paid '*in cash against transfer of the Property into the name of the Purchaser*'.

[2] Pursuant to the terms of the agreement, which will be considered in some detail presently, and against payment of the aforementioned purchase price, ownership of the apartment and its stipulated associated amenities was transferred to the first respondent subject to a right of *habitatio* registered in favour of the second respondent. By reason of the definition of '*date of acquisition*' in s 1 of the Transfer Duty Act 40 of 1949,[1] transfer duty, as set forth in s 2 of the Act, became payable by the respondents within six months of the conclusion of the agreement.[2]

[3] In terms of s 14,[3] the parties to any '*transaction*' by which '*property*' is acquired are required to furnish declarations in the prescribed form to the Commissioner for transfer duty purposes. The respondents completed separate transfer duty declarations, thereby implying that two *transactions* had been entailed. The first respondent declared that she had acquired the 'bare dominium' of the property for a consideration of R2 869 103,40, and the second respondent separately declared that he had acquired the right of *habitatio* for a consideration of R1 330 896,60. No mention of any consideration in the aforesaid amounts was made in the deed of alienation, but added together they make up the sum of R4,2 million that was stipulated in the contract as '*the purchase price*'.

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[1] Insofar as relevant, the Act defines '*date of acquisition*' to mean '(*a*) *in the case of the acquisition of property (...) by way of a transaction, the date on which the transaction was entered into, irrespective of whether the transaction was conditional or not ...*'.

[2] In terms of s 3(1) of the Act.

[3] Section 14(1) of the Act provided as follows at the relevant time (prior to its substitution in terms of the Voluntary Disclosure Programme And Taxation Laws Second Amendment Act 8 of 2010) (underling supplied): *Declarations appropriate to the manner of the acquisition of property in any particular case shall, in substance as near as possible to the wording of the forms prescribed by the Commissioner, be completed and submitted in such manner (including electronically) and at such place as may be prescribed by the Commissioner, by the parties to the transaction whereby the property has been acquired and, if the Commissioner so directs, also by the agent, auctioneer, broker or other person who acted for or on behalf of either party to the transaction or, if the property has been acquired otherwise than by way of a transaction, by the person who acquired the property.*

[4] The seller, on the other hand, made a single transfer duty declaration in which, under '*Details of purchase transaction*', it was indicated that transfer duty was payable on R4,2 million '*being total consideration*'. The seller's declaration gave the details of the purchaser(s)/transferee(s) as follows: the first respondent's name ('*bare dominium holde*r') and the second respondent's name ('*right of habitatio*'). The fact that the seller made a single transfer duty declaration necessarily implied that it considered that its disposal of the property had involved a single transaction.

[5] Treated as separate transactions in accordance with the respondents' transfer duty declarations, and because the rate of transfer duty is determined on a sliding scale in terms of s 2(1)(b) of the Act, the total amount of duty payable would be R225 998,49 (R174 526,77 in respect of the declared value of the 'bare dominium' and R51 471,72 in respect of the value imputed by the second respondent to the right of *habitatio*). The Commissioner determined, however, that the transfer duty fell to be calculated in the amount of R281 000 with reference to the agreed consideration of R4,2 million in respect of a single transaction.

[6] The respondents paid the transfer duty in the amount assessed by the Commissioner under protest. Their subsequent appeal against the Commissioner's determination was upheld by the Tax Board and thereafter, on rehearing in terms of s 115 of the Tax Administration Act 28 of 2011, also by the Tax Court.

[7] The *res vendita* was '*property*' as defined in paragraph (a) of the definition in s 1 of the Act, which at the time read as follows:

> *'**property**' means land in the Republic and any fixtures thereon, and includes-*
>
> (a) *any real right in land but excluding any right under a mortgage bond or a lease of property other than a lease referred to in paragraph (b) or (c) .*

It was common ground between the parties, correctly so, that a right of *habitatio* constitutes a limited real right in land and qualifies as 'property' under the aforementioned paragraph of the definition.

[8] The following further provisions of the Act are of particular relevance to the issue that falls to be determined in this appeal:

A. Section 2(1), which insofar as relevant provides:

> ***Imposition of transfer duty***
>
> *(1) Subject to the provisions of section 9, there shall be levied for the benefit of the National Revenue Fund a transfer duty (hereinafter referred to as the duty) on the value of any property (which value*

> *shall be determined in accordance with the provisions of sections 5, 6, 7 and 8) acquired by any person on or after the date of commencement of this Act by way of a transaction or in any other manner, or on the amount by which the value of any property is enhanced by the renunciation, on or after the said date, of an interest in or restriction upon the use or disposal of that property, at the rate of - ....*(Underlining supplied for emphasis.)

(Section 2(1) falls to be construed with reference to the defined meaning of 'transaction' in s 1, which insofar as relevant provides: '***"transaction"*** *means – (a) in relation to paragraphs (a), (b) and (c) of the definition of "property", an agreement whereby one party thereto agrees to sell, grant, waive, donate, cede, exchange, lease or otherwise dispose of property to another person or any act whereby any person renounces any right in or restriction in his or her favour upon the use of or disposal of property …*'.

B. Section 5(1), which provides:

> ***Value of property on which duty payable***
>
> *(1) The value on which duty shall be payable shall, subject to the provisions of this section-*
>
> *(a) where consideration is payable by the person who has acquired the property, be the amount of that consideration; and*
>
> *(b) where no consideration is payable, be the declared value of the property.*

[9] The respondents, who are life partners, bought the apartment to be their home. The idea that the first respondent should be registered as the sole owner, with the second respondent having a registered right of *habitatio*, was intended to provide them with protection against the possibility of losing their home should the second respondent, who is a partner in a firm of attorneys, happen to be faced with a crippling liability in consequence of any large claim that might be made against the firm. The registered right of *habitatio* (which would endure for his lifetime) would afford the second respondent security of occupation in respect of the property and by virtue of its legal character would not be exigible by his creditors. (It seems implicit in the scheme that should the couple choose to sell the property and live elsewhere, the second respondent would renounce his right of *habitatio* so that full dominium of the property could be transferred to a purchaser.)

[10] The seller did not give evidence, but I think it may be accepted that a seller of the apartment in an arm's length transaction would have had no interest in the purchasers' scheme to protect themselves against potential creditors. It would have been interested only in obtaining a market-related consideration for the sale of the property; an object the achievement of which ordinarily would not be facilitated by disposing of the right just to

occupy it and, separately, of the so-called 'bare dominium' over it. All the indications are that this was an arm's length transaction.

[11] It is apparent from the aforementioned provisions of the Act as applied to the facts that the appeal turns on whether there was one 'transaction', as contended by the Commissioner, or two 'transactions', as contended by the respondents. In order for the respondents' contention to prevail, the reservation of a right of *habitatio* to the second respondent would have to be an acquisition that was independent of, and not integral to, the transfer of title of the property from the seller to the first respondent. For transfer duty purposes an objective determination has to be made whether one or two transactions were in fact involved. That turns on the proper construction of the parties' contract.

[12] The fact that separately registerable rights were to be acquired by the purchasers is not determinative. It is authoritatively established that a multiplicity of individually registerable properties of various values may be the subject of a single transaction for transfer duty purposes. See *Commissioner for Inland Revenue v Freddies Consolidated Mines Ltd* 21 SATC 132, 1957 (1) SA 306 (A), [1957] 1 All SA 344, in which the character of the dispute over the calculation of transfer duty was closely analogous to that in the current case. Centlivres CJ described the factual background to the matter as follows:

> In terms of two separate agreements entered into on the same day the respondent company bought the whole of the undertaking and assets of two other companies for the sums of £5,075,980 and £5,177,942 10s. 0d. respectively. In the one agreement the following clause appears:—
>
> > "*4. It is hereby acknowledged and recorded that of the consideration payable by the purchaser company to the seller company, £730,695 is payable in respect of the immovable property referred to in the schedule hereto marked 'A', which £730,695 is the value of such immovable property, as shown in the books of the seller company.*"
>
> In the other agreement the same clause appears, excepting that the figure is £717,463. Each of the "A" schedules shows that the immovable property referred to in clause 4 of the agreement consists of a large number of separate erven in townships, each erf being referred to by its number. That schedule does not place a value on any of the erven. Those erven were at the time the agreements were entered into registered as separate erven in the Deeds Registry at Bloemfontein.
>
> The respondent and the sellers submitted declarations of purchaser and seller to the Receiver of Revenue in which the true value of each of the erven was stated separately, totalling the above sums of £730,695 and £717,463 respectively. In the case of most of the erven the value of each individual erf was less than £5,000. The appellant admits that the value of each individual erf is the value shown in the declarations of purchaser and seller but denies the relevancy of such value.
>
> A dispute arose between the parties as to the amount of the transfer duty that was payable in terms of sec. 2 of Act 40 of 1949. The Commissioner for Inland Revenue claimed £57,826 6s. 6d. as transfer

> duty on the basis that the duty had to be calculated on the total values of all the erven and not on the value of each individual erf. The respondent contended that the transfer duty payable was £43,950 16s. 9d. on the basis that the duty had to be calculated on the value of each individual erf. On that basis the duty would be 3 per cent on so much of the value of each erf as does not exceed £5,000 and 4 per cent thereafter. The Commissioner contended that duty was payable at 3 per cent on £5,000 of £730,695 and £717,463 respectively and at 4 per cent thereafter. In order to obtain transfer of the erven into its name the respondent paid the amount claimed by the Commissioner. It first paid £43,950 16s. 9d. and thereafter paid under protest the balance demanded by the Commissioner, viz. the sum of £13,875 9s. 9d.

The Appellate Division, overruling a decision to the opposite effect of the Transvaal Provincial Division, upheld the Commissioner's assessment. It did so primarily on the basis that the sale of the several units of land listed separately on the annexures to each of the agreements had in each case formed an integral part of a single indivisible transaction. Centlivres CJ reasoned the court's finding as follows (at 311 SALR, 347 All SA): '*In the present case the respondent by virtue of the two contracts entered into by it acquired the right to acquire the ownership of the property mentioned in those contracts. In the case of each contract that right was acquired by way of one "transaction" and it seems to me that that right was indivisible. And in each contract the consideration for the acquisition of that right is stated: that consideration is, therefore, in terms of sec. 5(1)(a), the value upon which the duty must be calculated, ...*'. (My underlining.)

[13] It also seems to me not to matter that in the current case there were two purchasers, each of which was to acquire different rights in the property. The principle still applies if they were to do so in terms of 'a unitary transaction'.[4]

[14] It is therefore necessary to examine the agreement in more detail to determine whether it does indeed establish that the rights of the respondents to acquire property thereunder involved an integral transaction. The rules of interpretation are so well-established that it would be a supererogation to set them out in detail. Suffice it to say that central to the exercise of interpreting a written contract is construing the language used in the deed with appropriate regard to the particular context. Context in this respect is not limited only to the immediate context of the words used within the four corners of the contract, but also involves having regard to its apparent nature and purpose; all of that to be judged against the relevant factual matrix in which the contract was concluded.[5] Within the limits of the

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[4] The term used in *Chrysalis v Katsapas* 1988 (4) SA 818 (A), at 825F.

[5] See, amongst other pertinent authority, *Joubert v Enslin* 1910 AD 6 at 37-8; *Swart en 'n Ander v Cape Fabrix (Pty) Ltd* 1979 (1) SA 195 (A) at 202; *KPMG v Securefin Ltd* [2009] ZASCA 7, [2009] 2 All SA 523 (SCA), 2009 (4) SA 399, at para. 39; *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13,

language used by the parties read in its context in the sense aforementioned it is also necessary to approach the construction of the contract with sensible regard to the business or practical result the parties apparently sought to achieve thereby.[6] 'Sophisticated semantic analysis' should not be permitted to negate an evident commercial or practical object that the parties clearly sought to achieve by entering into the contract.[7]

[15] The deed of agreement, which was executed using a pro forma '*Offer to Purchase (Sectional Title)*' contract document used by the seller's estate agents, identified the parties to the agreement and the *res vendita* as follows (the italicised words or information were inserted in the pro forma template in handwriting):

OFFER TO PURCHASE (SECTIONAL TITLE)

To *Morrow Inv No. 252 CC*….the Seller/s

Resident at…….(Address)

I/We [*the second respondent*] and [*the first respondent*] …the Purchaser/s

~~Resident at~~ *to/of the right of habitatio and the bare dominium respectively* …(Address)

but jointly offer to purchase the Unit/s being unit/s as defined in the Sectional Titles Act 95 of 1986 ("the Act") and exclusive use areas (If any recorded below ("the units") consisting of the following:

of 309 South Seas

					EXCLUSIVE USE AREAS		
	FLAT/ TOWN HOUSE	GARAGE	STORE ROOM	SERVANT'S ROOM	COVERED PARKING BAY	OPEN PARKING BAY	OTHER
KNOWN AS	*108*		*1*		*PB 112* *PB 113*		
SECTION NO/S	*108*						
ESTIMATED MONTHLY LEVIES							

[2012] 2 All SA 262 (SCA), 2012 (4) SA 593, at para 18; *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* [2013] ZASCA 176, [2014] 1 All SA 517 (SCA), 2014 2 SA 494 at para 12; and *Novartis v Maphil* [2015] ZASCA 111, [2015] 4 All SA 417 (SCA), 2016 (1) SA 518; at para. 24- 31.

[6] See *Picardi Hotels Ltd v Thekwini Properties (Pty) Ltd* 2009 (1) SA 493 (SCA) at para. [5].

[7] Cf. *Lloyds of London Underwriting Syndicates 969, 48, 1183 and 2183 v Skilya Property Investments (Pty) Ltd* [2004] 1 All SA 386 (SCA) at para. [14]. In *Bothma-Batho Transport* supra (in fn. 7), the observation by Lord Steyn in *Society of Lloyd's v Robinson* [1999] 1 All ER (Comm) 545 (HL) at 551:

> *Loyalty to the text of a commercial contract, instrument, or document read in its contextual setting is the paramount principle of interpretation. But in the process of interpreting the meaning of the language of a commercial document the court ought generally to favour a commercially sensible construction. The reason for this approach is that a commercial construction is likely to give effect to the intention of the parties. Words ought therefore to be interpreted in the way in which a reasonable commercial person would construe them. And the reasonable commercial person can safely be assumed to be unimpressed with technical interpretations and undue emphasis on niceties of language*

was cited with approval. See also *Rainy Sky S.A. and Others v Kookmin Bank* [2011] UKSC 50, [2012] 1 All ER 1137 (SC) at para. 21.

And more fully described on the sectional plan of the building or buildings known as *SS South Seas* Scheme No *492/2004* situate at *Green Point Cape Town* and subject to all terms and servitudes mentioned or referred to in the aforesaid Sectional Plan and to all such other conditions and servitudes which may exist in regard thereto and as mentioned in the Title Deeds of the Rules governing the scheme thereof and in the condition and to the extent such as it now lies VOETSTOOTS.

[16] The following numbered clauses of the contract are also pertinent to the question under consideration:

1. PURCHASE PRICE

   The purchase price R *Four Million two hundred thousand and nil cents (R4 200 000,00)* payable as follows:

   (a) A deposit of *R250 000 5* days of acceptance of the offer (sic) to be deposited with the Seller's conveyancers and held by them in trust in an interest bearing account, for the Purchaser's benefit pending registration of transfer;

   (b) The balance to be paid in cash against transfer of the property into the name of the Purchaser. When requested by the Seller's conveyancers, the purchaser shall furnish a banker's or other approved guarantee covering payment of such balance within 14 days of the request.

2. RISK

   On registration of transfer the risk of ownership shall pass to the Purchaser from which date the Purchaser shall receive all benefits from the property. The Seller shall, however, remain responsible for the maintenance, good order and repair of the interior of the Unit until registration of transfer and undertakes to abide by the said Rules until transfer is registered.

3. OCCUPATION

   (a) Vacant occupation shall be given to the Purchaser on *Transfer*. If the date of occupation does not coincide with the date of registration of transfer, the party in occupation of the property, while it is registered in the name of the other party shall pay to the other party a rental of *R15 000,00* per month payable from date of occupation monthly in advance at the conveyancer's office. In addition, the Purchaser shall bear all liability for the levies determined by the Body Corporate in terms of Section 37 of the Act, with effect from the date of occupation.

   (b) All amounts payable to the Body Corporate in terms of Section 37(1) of the Sectional Title Act of 1986 (commonly known as "LEVIES") shall be payable by the Purchaser as from date of occupation, and where appropriate, a pro rata share in relation to a given month.

   (c) In particular, it is recorded that a special levy (over and above the monthly levies) has been raised by the Body Corporate and in respect of the property sold is payable at the rate of R ……. per month.

      (i) The Purchaser assumes liability for such special levy with effect from the date of occupation and will discharge the full balance owing in respect thereof as at date of occupation in accordance with the payment schedule as agreed upon by the Body Corporate.

OR

(ii) …[Deleted]

4. TRANSFER

Transfer of the property shall be effected by the ~~*Purchaser's*~~ *Seller's* conveyancer on *1/11/2009* or as soon as possible thereafter. The Purchaser shall on demand sign all transfer and bond documents and pay transfer costs, registration of bond costs, transfer duty, stamp duty, Value Added Tax (V.A.T) if applicable and all incidental charges.

5. FIXTURES

… …

6. MORTGAGE BONDS

… …

7. BROKERAGE

On acceptance of this offer or if it is subject to any suspensive condition(s), upon fulfilment thereof, the seller shall be liable to Sotheby's for ~~7,5%~~ *3.5%* commission plus V.A.T. In the event of this sale being cancelled through a breach of contract on the part of the Purchaser, Sotheby's shall be entitled, but not obliged, to claim such commission and V.A.T. from the Purchaser without prejudice to Sotheby's rights against the Seller. Both parties hereby irrevocably authorise and instruct the conveyancer to pay, upon registration of transfer the commission and V.A.T. to Sotheby's from any deposit and/or other amount/s paid by the Purchaser, such payment to rank as first charge against any monies due, owing and payable to the Seller or his nominee.

8. BREACH

(a) If the Purchaser commits any breach of any term of this offer and does not remedy it within 7 days of receipt by pre-paid registered post, or delivery by hand, of a letter requiring the breach to be remedied, the Seller shall be entitled without prejudice to any other rights which he may have under this agreement, to:

(i) cancel this agreement and claim damages and interest, or

(ii) cancel this agreement and retain all monies already paid by the Purchaser in terms thereof, as agreed pre-estimated liquidated damages, or

(iii) sue for the full purchase price and interest thereon and damages.

(b) For all purposes arising from this agreement the Seller and Purchaser choose Domicilium Citandi et Executandi at the respective addresses set out in this agreement.

(c) A letter sent by Prepaid Registered Post shall be deemed to have been received by the Addressee/s 7 days after posting.

9. LIABILITY/WARRANTIES

(a) In the event of there being more than one Purchaser then they be jointly and severally liable for all obligations in terms thereof;

(b) This document contains the entire agreement between the parties. Neither party relies nor may rely upon any representations, warranties, undertakings or expressions of opinion which have not been incorporated into this agreement.

(c) ….

10. ELECTRICAL INSTALLATION.

… .

11. The parties undertake to do all things as may be necessary for the fulfilment of the terms and conditions of this agreement.

12. … .

13. SOLD BOARD

With the consent of the Body Corporate, Sotheby's may display a "SOLD" board on the property from the date of acceptance of this offer until three months after the date of occupation.

14. THE PARTIES CONFIRM

(a) .

(b) that Sotheby's was the effective cause of this sale being concluded.

(c) that the meaning and consequences of all the clauses of this document have been explained to each party.

…

18. This offer is irrevocable until [~~illegible~~] *12H00 on 6/8/2009* and is binding upon acceptance hereof ~~without~~ *only if* ~~having~~ has been notified of the Seller's acceptance.

(The handwritten wording has been italicised.)

[17] In my view there are a great number of salient pointers in the deed of agreement to there having been only a single indivisible transaction in contemplation by the contracting parties. So many, in fact, that it would unnecessarily extend the length of this judgment to spell each of them out. I shall confine myself to those that I consider especially significant. Their effect is overwhelming.

1. The agreement expressly refers to the purchasers as acting 'jointly' as parties to the contract; whereas the construction contended for by the respondents requires accepting that they acted severally. They could not jointly in a single contract acquire the right of *habitatio* and discretely jointly acquire the bare dominium against payment of a single consideration, for they would then automatically obtain joint full ownership of the property. The peculiar use of the word 'jointly' in the given context denoted the offerors' intention that the respective rights to be acquired by them in the property were to be acquired together in one transaction – an all or nothing situation.

2. The undertaking by the purchasers of joint and several liability 'for all obligations in terms [of the agreement]' is irreconcilable with the respondents' contention that the intention was to enter into two divisible transactions. What purpose would be served by each of them undertaking several liability for the full purchase consideration of

R4,2 million if the whole contract did not fall to be performed integrally and indivisibly?

3. Only a single purchase price is given; there is no indication that separate prices had been agreed upon between the seller and the purchasers for the right of *habitatio* and the bare dominium. Compare in this regard *Modder East Orchards Ltd v Receiver of Revenue* 1 SATC 40, 1924 TPD 14, where Stratford J observed '*The appropriation of separate considerations is a crucial point in deciding upon the divisibility of a contract. The parties have not divided the consideration and there is nothing to show what consideration should go to one portion of the subject matter and what should go to the other. Therefore I have very little doubt on the construction of this particular agreement that the contract is not divisible and that what was really sold was the improved plot at the end of three years*'.[8] I accept that the appropriation of separate considerations might not be determinate in every case,[9] but it seems to me to be a material consideration in the current case. This may be illustrated by asking the question what the consideration payable for the right of *habitatio* would be if the second respondent were to repudiate her undertaking in terms of the contract to take transfer of registered title to the property. The second respondent used the calculation of value formula given in the Revenue Service's handbook for the purpose of determining the declared value, but it is by no means evident, and the agreement itself gives no indication, that the seller had bound himself to partial performance of the contract at that consideration. On the contrary, the indications in the contract are that the seller wanted to dispose of its ownership rights in the apartment entirely in return for payment of the stipulated R4,2 million consideration.

4. Another feature that weighs in this regard is that the contract would fail to comply with the formalities prescribed in terms of the Alienation of Land Act if it were characterised as giving rise to two discrete transactions. In order to comply, the agreed price for each sale would have had to be expressed in the deed of alienation.

[8] At p. 19 of the 1924 TPD law reports.

[9] Cf. *Minister of Finance v Gin Bros and Goldblatt* 19 SATC 248, 1954 (3) SA 881(A), [1954] 3 All SA 100, in which the purchase of two adjoining plots of land was characterised for transfer duty purposes as having involved a single transaction notwithstanding the allocation of separate prices to each of them in the contract of sale. In arriving at that decision the majority judgment had regard in the particular factual context of the agreement to the evident substance of the transaction rather than the form in which it was expressed in the contract.

Any interpretation of the deed should prefer a construction upholding its effectiveness over one that would result in it having been unenforceable.

5. Transfer was to be given only against payment of the agreed consideration of R4,2 million; the agreement gives no indication that either of the purchasers would be entitled to part performance against payment of a lesser amount than the full stipulated price. Transfer of what the first respondent had contracted to acquire could only be given if attended by registered reservation of the right of *habitatio* in favour of the second respondent and payment of the full stipulated price. The agreement provides for the payment of a single deposit on the purchase price and contemplates a single payment in respect of the balance following the furnishing of a single guarantee. The seller is under no obligation to transfer any right in the property save as against payment of the full balance of the R4,2 million purchase price. That is indeed what happened. The notarial deed of right of *habitatio* in favour of the second respondent was registered immediately before, and on the same day as the deed of transfer of title of the property. The terms of the notarial deed expressly cross-referenced the intended transfer of the 'bare dominium' in the property to the first respondent and made no reference to any consideration for the right of *habitatio*. The contemporaneously registered deed of transfer on the other hand refers to the cession of transfer of the sectional title unit 'in full and free property' to the first respondent subject to the right of *habitatio* in favour of the second respondent in terms of the aforementioned notarial deed in furtherance of the sale of the property for R4,2 million.

6. Commission calculated at 3,5% of the stipulated R4,2 million purchase price was payable by the seller to the estate agent upon conclusion of the agreement. In clause 14(b) the parties agree that the estate agent was the effective cause of 'this sale'. The wording sensibly relates to only one, not two, transactions, having been involved

7. Whilst it is plain that the seller's object was to achieve payment of a contract price in the full amount of R4,2 million out of the transaction, it is equally evident that the scheme of the respondents to protect their intended home against the second respondent's potential creditors could not be realised, other than incidentally, if the contract were not implemented as 'a unitary transaction'.

8. The content of the concept of 'bare dominium', which is an imprecise term in the abstract, is informed by the extent of the derogation from the full bundle of ownership rights of the right of *habitatio* to be conferred under the contract *on the second respondent*. The content of the bare dominium would be different, for example, if the right of *habitatio* were to be given to someone younger or older than the second respondent, for that person's life expectancy would impact on the length of time that might be expected to pass before the derogation from the first respondent's ownership rights as title holder would lapse. That in turn would impact, adversely or beneficially as the case might be, on the value of the bare dominium to be acquired by the first respondent. It would be singularly unbusinesslike for the first respondent to purchase the bare title of a property subject to the reservation of a right of *habitatio* to be reserved in favour of some as yet undetermined third party to be identified in a separate contract yet to be concluded by the seller in the event of the second respondent not taking it up.

9. Furthermore, the nature of the 'bare dominium' to be acquired by the first respondent in terms of the contract is actually defined by that of the right of *habitatio* to be acquired by the second respondent. 'Bare dominium' is sometimes referred to as 'defective dominium' (*dominium minus plenum*), which is anything less than 'full dominium' (*dominium plenum*). The distinction is succinctly elucidated in Claassen, *Dictionary of Legal Words and Phrases*, 2 ed., s.v. '*Dominium Plenum*' as follows:

> … Ownership is of two kinds. The owner may be entitled to use the thing (*jus utendi*), to enjoy its fruits (*jus fruendi*), to consume it entirely where it is capable of consumption (*jus abutendi*) and to alienate or dispose of it as he pleases (*jus disponendi*). On the other hand, the ownership may be wanting in any of those rights owing to a real burden by way of servitude (real or personal) or *fideicommissum* or mortgage. In the former case, where all the rights of ownership are present, the dominium is said to be *plenum*; in the latter case, *minus plenum* (Van Leeuwen *Comm* 2.2.1).

In the current case the ownership to be acquired by the first respondent was *dominium minus plenum* because it was to be subject to a personal servitude of *habitatio* in favour *of the second respondent*. The character of the burden on the ownership to be acquired by her – in other words, what made it the 'bare dominium' that she had contracted to acquire – was defined by the agreed conferral of servitutal rights to be registered in favour *of the second respondent* simultaneously with transfer of registered title in her name. There are any number of other types of servitude that

could have been imposed on the property with derogating effect on the extent of first respondent's ownership. The extent of the derogation in each case would depend on the nature of the servitude that was involved. It is the nature of the servitude in point that defines the content of the so-called 'bare dominium'.[10] The character and substance of what the parties contemplated by 'bare dominium' in the contract under consideration are defined by the *particular* nature of the derogation from full ownership provided for in the agreement (i.e. the right of *habitatio* to be vested *in the second respondent*). What falls to be acquired *by the first respondent* under the contract under the descriptor 'the bare dominium' is amorphous if it is not integrally related to that which falls to be acquired *by the second respondent* thereunder.[11] This highlights the integral character of the transaction by which the respective property rights fell to be acquired. The first part has no meaning contextually if it is divorced from the second.

[18] The ordinary import of the language of the contract, when it is read as a whole, goes against the meaning contended for by the respondents. The respondents' contention also flies in the face of any commercial sense as between themselves and the seller. In my judgment, it cannot prevail.

[19] In upholding the respondents' appeal the Tax Court led itself into error in my respectful view by being distracted by the fact that each of the purchasers stood to acquire separate and distinctive rights in the property under the agreement. The fact begged the question whether the acquisitions were in terms of a single integral (or unitary) transaction or two transactions. The court a quo also allowed itself to be misled by the Commissioner's

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[10] Cf. *Estate Smuts v Commissioner for Inland Revenue* 1929 TPD 961, (a succession duty case) in which Feetham J held that bare dominium' in the context of s 12(6)(a) of Act 29 of 1922 (as amended), which provided insofar as relevant:

> *Where the succession consists of the accrual of full ownership in any property to the holder of the bare dominium therein by reason of the cessation of any usufructuary or other like interest held in such property by the predecessor the value of the succession shall be the difference between the fair market value of the full ownership of the property as at the date of such cessation and the value of the bare dominium as at the date of …*

had been used *'not in the sense of <u>dominium</u> which confers no beneficial ownership, but in the sense of <u>dominium</u> which confers something less than full ownership*'. It is evident from the further discussion by the learned judge on the same page that he conceived of 'bare dominium' as the difference between '*less than full ownership and the additional rights necessary to constitute full ownership*' which he conceived might in a given case even be accrued from different sources. This serves to highlight that what constitutes 'bare dominium' in any case is the difference between *dominium plenum* and whatever else is required *in that particular case* to convert the bare dominium into full ownership. A wide range of possibilities is notionally conceivable; what it actually involves depends on the nature of the other rights that give rise to the derogation from full ownership in the particular case.

[11] English words italicised for emphasis.

acceptance that the right of *habitatio*, separately assessed, had been correctly valued in accordance with the SARS handbook for transfer duty purposes. That was not the question for decision, however. The Commissioner contested the validity of a separate valuation of the *habitatio* in the circumstances. The notional value of the right of *habitatio* assessed independently of the transaction value was irrelevant if only one transaction was involved. The point is illustrated by the judgment in *Freddies Consolidated Mines* supra, in which, it will be recalled, the Commissioner did not contest the values of the individual erven that were sold, but argued successfully that because two composite transactions rather than a divisible sale of each individual erf had been involved transfer duty fell to be paid on the transactional consideration, and not the value of each erf assessed separately. The Tax Court gave no consideration to the effect of the respondents having undertaken joint and several liability for the whole purchase price. The judgment of the court a quo also did not address the issues identified above (at paragraph [17]); in particular the matter of the character of the bare dominium to be acquired by the first respondent having been defined in the contract by that of the right of *habitatio* to be acquired by the second respondent.

[20] It follows that the appeal must succeed. We were informed that the parties have come to an arrangement on costs. The respondents have abandoned the costs order made by the Tax Court, and no order as to costs is sought by either side in this court. The following order is made:

1. The appeal from the Tax Court is upheld.
2. The order of the Tax Court is set aside and replaced by an order:
    (a) Dismissing the appeal; and
    (b) Confirming the Commissioner's assessment of transfer duty on the contractually stipulated consideration of R4,2 million.

A.G. BINNS-WARD
Judge of the High Court

B. WAGLAY
Judge of the High Court

L. NUKU
Judge of the High Court

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